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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

No. 79-900

FEDERAL TRADE COMMISSION, et al.,
Petitioners,

vs.

STANDARD OIL COMPANY OF CALIFORNIA,
Respondent.

Brief of Respondent In Opposition to Petition for a Writ of Certiorari

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PRELIMINARY STATEMENT

The petition seeks review of a Ninth Circuit order that reverses the dismissal of a complaint on the face of the pleading and remands the case for further proceedings in the district court. The case is governed by long-settled legal principles embodied in the Administrative Procedure Act, and there is no reason for the Court to depart from its regular practice of abstaining from review of such interlocutory orders.[1]

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[1]E.g., *Firemen* v. *Bangor & A. R. Co.* (1967) 389 U.S. 327, 328; *Hamilton Shoe Co.* v. *Wolf Brothers* (1916) 240 U.S. 251, 257-258; *Amer. Const. Co.* v. *Jacksonville Railway* (1893) 148 U.S. 372, 384.

The Ninth Circuit decision is based on allegations of a flagrant failure by the Federal Trade Commission to adhere to an explicit limitation on its authority to issue complaints embodied in its organic act. The complaint of Standard Oil Company of California (Socal) alleges—with support in detailed factual allegations (infra, pp. 5-7)—that the Commission did not exercise its discretion and make a good faith determination of reason to believe that Socal had violated the Federal Trade Commission Act, and that the Commission issued its complaint in Docket No. 8934 because of extraneous political considerations entirely unrelated to the merits of any reason to believe that Socal had violated the law.

The Ninth Circuit *accepted* the position, which the Commission argues in the petition, that "a determination by the FTC that there is 'reason to believe' a violation of law has occurred is within the agency's discretion and not reviewable in the district court under the APA" (Pet., Appx. B, p. 10a). The question for which review is ostensibly sought is not presented by the interlocutory order in the instant case.

Nor is there any basis for the Commission's speculation that the decision below "threatens serious disruption to the administrative process" (Pet., p. 9).[2] Under the allegations of Socal's complaint, which stand admitted on motion to dismiss, the Ninth Circuit decision is plainly correct under settled principles of review of agency action em-

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[2]Several other agency counsel also disagree with the decision but recognize that "the case admittedly arose in an unusual situation involving the FTC and congressional pressures put upon it" (Pet., Appx. F, p. 33a).

bodied in the judicial review provisions of section 706 of the Administrative Procedure Act.

THE QUESTION PRESENTED

Where the statute creating the Federal Trade Commission authorizes the Commission to issue a complaint only when it makes a determination that there is reason to believe that the Federal Trade Commission Act has been violated, does a complaint for declaratory relief filed in district court by a respondent in a Commission proceeding, alleging (a) that the Commission in issuing its complaint made no determination that it had reason to believe that the respondent had violated the law and (b) that the Commission improperly based its action on extraneous political considerations, state a claim on which relief can be granted?

STATEMENT OF THE CASE

This is a pleading case. It is settled that complaints are to be liberally construed and that a complaint may not be dismissed if it states a claim for relief under any set of facts that might be proved under its allegations (*Conley* v. *Gibson* (1957) 355 U.S. 41, 47-48; 2A Moore, Federal Practice, pp. 2266-2274).

Section 5 of the Federal Trade Commission Act provides that "[w]henever the Commission shall have reason to believe" that a violation of the Act has been or is occurring, and it appears to the Commission that a proceeding would be in the public interest, "it shall issue * * * a complaint stating its charges * * *" (15 U.S.C. § 45(b)). The Ninth Circuit stated:

"A restriction on the FTC's discretion is embodied in the very terms of 15 U.S.C. § 45(b). The FTC must first in fact make a 'reason to believe' determination that the law has been violated. See *Hunt Foods and Industries, Inc.* v. *Federal Trade Commission,* 286 F.2d 803, 806 (9th Cir.), *cert. denied,* 365 U.S. 877, 81 S.Ct. 1027, 6 L.Ed.2d 190 (1961). The restriction provides 'law to apply' in this case because Socal claims that the FTC disregarded the restriction and acted outside the terms of the statute. Socal claims the FTC complaint number 8934 was hurriedly issued with hardly any precomplaint investigation of Socal and under the pressure of outside influences. In short, Socal claims that the FTC did not make and, in the circumstances, could not have made the 'reason to believe' determination despite a recitation on the face of the FTC complaint that the determination had been made.

"The allegations in Socal's complaint and the reasonable inferences from the allegations support Socal's claim. * * *

"* * * Because FTC complaints should not issue other than as prescribed in 15 U.S.C. § 45(b), Socal's claims should be reviewed. However, we emphasize that review is limited. It cannot extend to an assessment by the district court of what constitutes 'reason to believe' but simply whether the FTC disregarded the mandate and restriction of 15 U.S.C. § 45(b) by not even making a 'reason to believe' determination at all" (Pet., Appx. B, pp. 12a-13a).

The Ninth Circuit observed (Pet., Appx. B, pp. 12a-13a) that Socal's claims are supported by detailed factual allegations. These include the following:

1. In December 1971, the Commission instituted an investigation (Docket No. 721-0047) to determine whether oil companies were engaging in unfair acts or practices in violation of section 5. During the next 17 months, the Commission did not examine any of Socal's officers or employees or any of its documents, books and records.

2. On May 31, 1973, Senator Jackson, as Chairman of the Interior and Insular Affairs Committee of the Permanent Investigations Subcommittee of the Senate Committee on Government Operations, and then a presidential candidate, sent a letter to Chairman Engman asking the Commission to

> "prepare a report within thirty days regarding the relationship between the structure of the petroleum industry and related industries and the current and prospective shortages of petroleum products."[3]

The next day, June 1, the Commission issued subpoenas to three officials of Socal, who testified at investigatory hearings on June 26, 28 and 29.[4] And on July 6 the Commission issued a subpoena duces tecum directing Socal to produce documents, but the investigation in Docket No. 721-0047 was summarily closed before any response by Socal was due.

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[3]It is impossible to prepare a considered report dealing with such vast and complex subject matters in a 30-day period. The "current shortages" were the first peacetime shortages of fuel oil and gasoline in the nation's history.

[4]On June 27, 1973, The Evening Star and The Washington Daily News published an article with the heading "8 Oil Firms Face FTC Action." The article, based on "congressional sources," not FTC sources, stated in part "The Federal Trade Commission is prepared to recommend antitrust action against the eight major oil firms in light of the ongoing energy shortage, congressional sources have disclosed."

3. Also on July 6, 1973, with no examination by the Commission staff of any Socal documents or any of its officials except for the three questioned several days before, Chairman Engman sent Senator Jackson a report captioned "Preliminary Federal Trade Commission Staff Report on Its Investigation of the Petroleum Industry," stating:

> "This report has not been evaluated or approved by the Commission, and the findings and conclusions in the report do not necessarily reflect the views of the Commission."

On July 9, Senator Jackson threatened to publish the Preliminary Staff Report as a congressional committee print. On July 11, Chairman Engman objected to such publication, stating that

> "[t]he Commission recognizes its obligation to honor the legitimate requests of congressional committees for information. Disclosure of such a document to Congress, however, must be contrasted with its public release, which the Commission views as inconsistent with its duty to proceed judiciously and responsibly in determining what, if any, action should be taken on the basis of the staff investigation"

thereby making clear that the Commission had not made a determination as to what, if any, action the Commission should take. On July 13, Senator Jackson released the Preliminary Staff Report for publication as a committee print.

4. July 13 was a Friday. On Tuesday, July 17, with but one intervening business day after Chairman Engman's statement that the staff report had not been evaluated

by the Commission and its public release would be "inconsistent with the Commission's duty to proceed judiciously and responsibly" in the premises, a Commission news release stated that it was issuing the complaint in Docket No. 8934. On July 18 the complaint was issued bearing that date.

5. The Commission denied Socal's motion to dismiss or withdraw the complaint, refused Socal any discovery on the "reason to believe" issue, and stated that the issue would not be considered in hearings in the case and was absolutely immune from judicial review (Commission order, June 4, 1974).[5]

The Ninth Circuit concluded that "the allegations support Socal's claim" that the Commission had violated its statutory duty and based its action on legally improper considerations (Pet., Appx. B, pp. 12a-13a).

REASONS WHY THE PETITION SHOULD BE DENIED

1. **Socal's Complaint Plainly States A Claim For Relief; The Commission Must Adhere To Statutory Requirements Of Its Organic Act.**

The Commission's announcement of its complaint against Socal and other oil companies with but one intervening business day after Senator Jackson released the Preliminary Staff Report for publication reveals how the Commission felt the political pressure once the report was

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[5]The Commission acknowledged in the same order (printed as Appx. E to the petition) that it had received communications from members of Congress before the Commissioners issued the complaint, and offered the self-serving assurance that "None of the communications received by this agency from any member of Congress is even remotely of the character deemed improper by the courts." *No court knows what those communications were.*

published.[6] As the Ninth Circuit held, Socal's allegations support a reasonable inference that the Commission caved in to political pressures from congressmen anxious to find a scapegoat for the first peacetime shortages of gasoline and fuel oil in the nation's history, and that the Commission could not, in the far-reaching and complex circumstances in question, have been able to ascertain the relevant facts and make a good faith determination of reason to believe that Socal had violated section 5.[7]

The petition seeks to convey the false impression that the opinion below is "unprecedented" (Pet., p. 9). To the contrary, while the facts alleged are unusual, the issue is controlled by principle and precedent from the inception of the Court. There is simply no place for the Commission's assertion of an unreviewable power in the face of an express statutory limitation imposed by the Congress on the Commission's authority to issue complaints. Chief Justice Marshall put the query in *Marbury* v. *Madison* (1803) 1 Cranch. (5 U.S.) 137, 176:

> "To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained?"

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[6]As The New York Times said on March 16, 1975: "Once the report was out, congressional sources other than Senator Jackson said that the Commission was under great political pressure to file a complaint."

[7]In *Hunt Foods and Industries, Inc.* v. *F.T.C.* (9 Cir. 1961) 286 F.2d 803, 806, certiorari denied (1961) 365 U.S. 877, the court said: "The Commission cannot have 'reason to believe' unless it is in possession of facts warranting such a belief. It thus becomes the duty of the Commission to ascertain the relevant facts."

The Ninth Circuit's decision is firmly grounded in legal principles, codified in the Administrative Procedure Act, which guarantee judicial review of agency action that is contrary to statutory command or arbitrarily based on impermissible factors. Section 706 of the APA provides that a reviewing court shall "hold unlawful and set aside agency action" which is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or which is "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right."

In *Schilling* v. *Rogers* (1960) 363 U.S. 666, 676-677, on which the Commission asserts reliance (Pet., p. 12), the Court, in a decision under the Trading With The Enemy Act, pointed out that:

> "This is not a case in which it is charged either that an administrative official has refused or failed to exercise a statutory discretion, or that he has acted beyond the scope of his powers, where the availability of judicial review would be attended by quite different considerations than those controlling here."

It is precisely Socal's allegation that the Commission "refused or failed to exercise a statutory discretion" and "acted beyond the scope of its powers" as conferred by the Congress in section 5 of the Federal Trade Commission Act, by failing to make a good faith determination that it had reason to believe that Socal had violated the law. Socal's claim is not that the Commission's prosecutorial discretion is subject to untrammeled judicial review, as the petition erroneously suggests (Pet., p. 15), but that the Commission's failure to exercise its discretion in determining reason to believe, as mandated by the statute, may

be corrected. Prosecutorial discretion involving an exercise of discretion on the facts, or a determination of Commission enforcement policy, or an exercise of "the Commission's undisputed responsibility to decide what kinds of business conduct may be unfair" (Pet., p. 13), is not involved in this case.

In *Dunlop* v. *Bachowski* (1975) 421 U.S. 560, the Court rejected the view that agency decisions on complaint issuance are immune from judicial review for any reason, and rejected the "all or nothing" approach to judicial review advanced by the Commission in the instant case (Pet., pp. 12-13). The Court concluded that a decision by the Secretary of Labor not to file suit under the Labor-Management Reporting and Disclosure Act could be reviewed to insure that he had discharged his statutory duty to the plaintiff:

> "[C]ourts 'are necessarily [not] without power or jurisdiction . . . if it should clearly appear that the Secretary has acted in an arbitrary and capricious manner by ignoring the mandatory duty he owes to plaintiffs under the powers granted by the Congress. [Citing authorities]' " (421 U.S. 568).

The Court held that a limited review of a particular complaint issuance decision was not inconsistent with the Secretary's exercise of broad discretion to initiate proceedings, and served "to assure careful administrative consideration" of the action taken (421 U.S. 572). Thus, although "review may not extend to cognizance or trial of * * * the factual bases for the Secretary's conclusion," a court was required to "determine whether the Secretary's

decision was reached for an impermissible reason or for no reason at all" (421 U.S. 573).

In *Morgan* v. *United States* (1936) 298 U.S. 468, 480, the Court ruled that "[f]acts and circumstances must not be considered which should not legally influence the conclusion." Judge Learned Hand stated in *United States* v. *Shaughnessy* (2 Cir. 1950) 180 F.2d 489, 491, that agency action may not be premised on "considerations that Congress could not have intended to make relevant."[8]

The Ninth Circuit decision in the instant case is in full accord with these principles.

The Commission's contention that its complaint issuance is *entirely* "committed to agency discretion by law" and unreviewable ignores the specific language of the APA, which precludes judicial review only *"to the extent that"* agency action is so committed (5 U.S.C. § 701). As the Court recognized in *Dunlop* v. *Bachowski,* supra, this ex-

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[8]Courts regularly review prosecutorial and administrative decisions made on extraneous grounds (e.g., *United States* v. *Falk* (7 Cir. 1973) 479 F.2d 616, 624 (*en banc*); *Medical Com. for Human Rts.* v. *Securities & Exch. Com'n* (D.C. Cir. 1970) 432 F.2d 659, 673, vacated on other grounds (1972) 404 U.S. 403; *DeVito* v. *Shultz* (D.D.C. 1969) 300 F.Supp. 381, 382, 384). Ever since *Yick Wo* v. *Hopkins* (1886) 118 U.S. 356, it has been settled that the institution of proceedings for an improper purpose must be subject to correction in the courts.

The petition concedes (p. 15, n. 15): "While the discretion to institute administrative proceedings, like the discretion to bring criminal charges, is extremely broad, 'there are undoubtedly constitutional limits on its exercise.' *Bordenkircher* v. *Hayes,* 434 U.S. 357, 365 (1978)." The petition then later erroneously asserts (p. 21, n. 19): "The question whether the Commission made an 'independent' 'reason to believe' determination is clearly not of constitutional scope." To the contrary, that question clearly *is* of constitutional scope. Due process, as the cited cases show, has never permitted individuals to be prosecuted without basis for belief that they might have violated the law.

ception prevents a court from "substitution of [its] judgment" for the Commission's judgment, but does not preclude a limited judicial review to insure that the Commission exercised its discretion on the facts (421 U.S. 572).

There is no statutory prescription against judicial review in the instant case. In such circumstances, the Commission "bears the heavy burden of overcoming the strong presumption that Congress did not mean to prohibit all judicial review of [its] decision" (*Dunlop* v. *Bachowski* (1975) 421 U.S. 560, 567). Judicial review will be cut off entirely "only upon a showing of 'clear and convincing evidence' " of legislative intent to do so (*Abbott Laboratories* v. *Gardner* (1967) 387 U.S. 136, 141). The petition points to no such clear and convincing evidence in the history of the Federal Trade Commission Act. The fact that the Congress may have contemplated that the Commission exercise wide discretion in conducting *investigations* (Pet., p. 14) does not suggest a congressional intent that the Commission could disregard an express statutory requirement for the issuance of a complaint.[9]

In *Citizens to Preserve Overton Park* v. *Volpe* (1971) 401 U.S. 402, 410, the Court said that the committed-to-

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[9]On the contrary, the Commission acknowledged from its inception the statutory restriction imposed by the Congress on the issuance of complaints under section 5:

> "Reason to Believe—In view of the fact that the Commission is authorized to issue its complaint, not upon probable cause, but only upon grounds which give it 'reason to believe' that there has been a violation of the law, *the Commission is required to act,* and has acted, *with the utmost circumspection in the issuance of complaints* and the institution of proceedings. In all cases it makes a thorough preliminary investigation of the matters charged in order that no formal proceeding may be undertaken without an adequate foundation" (FTC Annual Report, June 30, 1916, p. 6, emphasis supplied).

agency-discretion exception to judicial review of 5 U.S.C. § 701(a)(2) "is a very narrow exception" which applies only "in those rare instances where 'statutes are drawn in such broad terms that * * * there is no law to apply.'" Here, there is law to apply under section 5 of the Federal Trade Commission Act, namely, that the Commission must make a good faith evaluation of whether there is reason to believe that Socal violated the law and must not issue its complaint on the basis of impermissible political factors.

Section 13 of the Federal Trade Commission Act (15 U.S.C. § 53) provides that "[w]henever the Commission has reason to believe" that a person is violating the Act, it may upon a proper showing in district court obtain an injunction pending the trial of a Commission complaint. The statutory "reason to believe" language of section 13 is a precise parallel to that of section 5 (15 U.S.C. § 45) here involved. Invoking section 13, the Commission applied for an injunction against the merger of British Oxygen Company and Airco, alleging that it had reason to believe the merger might be in violation of law. The court of appeals stated:

> "§ 13(b) requires that the Commission show the district court that it has 'reason to believe' a violation has occurred * * *" (*F.T.C.* v. *British Oxygen Co., Ltd.* (3 Cir. 1976) 529 F.2d 196, 199 (*en banc*)).

See also, *Federal Trade Commission* v. *Rhodes Pharmacal Co.* (7 Cir. 1951) 191 F.2d 744, 747-748. If the reason to believe requirement provides "law to apply" under section 13 of the Federal Trade Commission Act, it equally affords "law to apply" under section 5.

Southern Ry. Co. v. *Seaboard Allied Milling Corp.* (1979) ..... U.S. ....., 99 S.Ct. 2388, on which the Commission asserts reliance (Pet., pp. 8, 11, 15), recognizes the availability of judicial review in the circumstances alleged at bar. There was in *Seaboard* no allegation that the Interstate Commerce Commission had failed to perform a statutory duty. The Court distinguished the permissive provision of section 15(8)(a) of the Interstate Commerce Act involved in that case, which it held created no reviewable duty, from the mandatory language in section 13(1) of the Act, which did create a reviewable duty. Section 15(8)(a) provided that "'the Commission *may*, upon the complaint of an interested party or upon its own initiative, order a hearing concerning the lawfulness of [a] rate.'" The Court stated:

> "Congress did not use permissive language such as that found in § 15(8)(a) when it wished to create reviewable duties under the Act. Instead it used mandatory language * * *. In particular, § 13(1), which plainly authorizes rate-investigation decisions that are reviewable * * * provides that '[i]f . . . there shall appear to be any reasonable ground for investigating said complaint, it *shall* be the duty of the Commission to investigate the matter complained of * * *'" (99 S.Ct. 2395).

Section 13(1), creating a reviewable duty, is the analog of section 5 of the Federal Trade Commission Act, which provides that the Commission "*shall* have reason to believe" that a violation of the Act has occurred before issuing a complaint.[10]

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[10]Moreover, in both the *Seaboard* case and *Morris* v. *Gressette* (1977) 432 U.S. 491 (Pet., pp. 11, 12, 15), the Court's decision rested significantly on the fact that other avenues of judicial review were available to aggrieved parties. In *Morris*, the Attorney

What if the Commission's files contain a memorandum of a Commissioner saying, "We do not have anything to indicate that Socal has violated the law, but political pressure on the Commission is so strong that we are voting to issue the complaint anyway"? The Commission's contention of absolute unreviewability would render such agency conduct immune from correction by the courts. Under the rule of law, an opportunity must be afforded to present such a document in a court of law.

2. Enforcement Of Statutory Duty In The Issuance Of Commission Complaints Would Not Impair The Work Of The Commission Or The Courts.

The tone of the petition is not attention to the rule of law, but hyperbole—*in terrorem* assertions that compliance with the statutory standard of section 5 of the Federal Trade Commission Act in accordance with the "unprecedented decision" of the Ninth Circuit would "undermine the effective and orderly conduct of enforcement proceedings" and permit respondents to "engage in disruptive and dilatory litigation of ancillary procedural issues in the courts" (Pet., p. 9; see also Appx. F, p. 33a).

General's failure to object to a change in state voting laws was "not conclusive with respect to the constitutionality of the submitted state legislation" which was subject to "a subsequent action to enjoin [its] enforcement" (432 U.S. 505). In *Seaboard*, the Court emphasized:

> "Nor, in fact, are we holding entirely unreviewable the Commission's exercise of its rate-investigation authority. For any shipper may require the Commission to investigate the lawfulness of any rate at any time—and may secure judicial review of any decision not to do so—by filing a § 13(1) complaint" (99 S.Ct. 2394).

In the instant case, in contrast, Socal has no other way in which to obtain judicial review of the Commission's unlawful failure to comply with its organic act (see pp. 19-22, infra).

This is groundless exaggeration. The Commission ordinarily issues complaints only after an investigation. The complaint issuance here in dispute—arising out of political pressures in the first peacetime gasoline and fuel oil shortages in our history—is obviously unusual.[11]

In *Chattanooga Pharm. Ass'n* v. *United States Dept. of Justice* (6 Cir. 1966) 358 F.2d 864, the Department of Justice contended that its issuance of a Civil Investigative Demand under a statute authorizing such demands only when the Department "has reason to believe that [the] person under investigation may be in possession * * * of material relevant to a civil antitrust investigation" was immune from judicial review, and that the court should infer from the demand that the Department had reason to issue it—an argument equivalent to the Commission's contention here that its mere recital of reason to believe should preclude any judicial review of its complaint issuance decision (Pet., p. 13). The court of appeals affirmed the setting aside of a demand alleged to have issued for improper reasons:

> "We are not persuaded that a simple denial and, if necessary, proof contradictory of, the misuse of process charged to the Department would 'create a precedent which might seriously prejudice future administration of the Civil Investigative Demand statute'" (358 F.2d 866-867).

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[11]Rule 11 of the Federal Rules of Civil Procedure requires the attorney signing a complaint to have good grounds for the wrongs or irregularities alleged. Even the letter from agency counsel to the Solicitor General (Appx. F to Pet.) acknowledges that "the case admittedly arose in an unusual situation involving the FTC and congressional pressures put upon it" (Appx. F, pp. 32a-33a).

In *Accardi* v. *Shaughnessy* (1954) 347 U.S. 260, Accardi alleged that the Board of Immigration Appeals had declined to suspend a deportation order because the Attorney General had included his name on a list of "unsavory characters," rather than on the basis of the Board's own judgment on the record before it. The court of appeals held that an allegation that the Board "considered other matters" was legally insufficient because, if it were, "every deportable alien would so allege, merely to delay his justifiable deportation" (206 F.2d 901). This Court reversed, holding that Accardi was entitled to prove his allegation that the Board did not exercise its own judgment, but followed the dictates of the Attorney General. The asserted potential for burden on the courts and delay of the Board's process was not allowed to block the right to a lawful hearing. No more may the Commission here evade its obligation to comply with legal requirements of its organic act.

The Commission's asserted forebodings in the case at bar also ignore the fact that the district courts have ample powers to control discovery and to avoid unnecessary probing of the Commission's "deliberative process" (Pet., p. 2). The presumption of administrative regularity normally precludes inquiry into the "mental processes" of the Commissioners (Pet., p. 16; see *United States* v. *Morgan* (1941) 313 U.S. 409), but the presumption is not irrebutable, as the petition implies. Many decisions establish that, where a plaintiff makes a prima facie showing of irregularity, the court may permit further inquiry

necessary to resolve claims of administrative failure to adhere to the rule of law:

> "[T]he mental process rule [of the *Morgan* case] is but 'one facet of the general presumption of regularity' which attaches to decisions of administrative bodies * * * . [W]here a prima facie case of misconduct is shown, justice requires that the mental process rule be held inapplicable [citing numerous cases]" (*Singer Sewing Machine Company* v. *N.L.R.B.* (4 Cir. 1964) 329 F.2d 200, 208).[12]

In *Citizens to Preserve Overton Park* v. *Volpe* (1971) 401 U.S. 402, 420, the Court affirmed that a court "may require the administrative officials who participated in the decision to give testimony explaining their action." Inquiry into the mental processes of administrative decision makers, while usually to be avoided, may and should be allowed upon a strong showing of administrative irregularity. In the instant case, Socal's allegations, which the Ninth Circuit held supported a reasonable inference that the Commission had violated its statutory mandate, stand admitted on motion to dismiss the complaint.[13]

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[12]Accord, see, e.g., *United States* v. *Nixon* (1974) 418 U.S. 683, 706, 709; *D.C. Federation of Civic Associations* v. *Volpe* (D.C.Cir. 1972) 459 F.2d 1231, 1248, certiorari denied (1972) 405 U.S. 1030; *Sun Oil Company* v. *United States* (Ct.Cl. 1975) 514 F.2d 1020, 1024-1025; *KFC National Management Corp.* v. *N.L.R.B.* (2 Cir. 1974) 497 F.2d 298, 305; *Committee for Nuclear Responsibility, Inc.* v. *Seaborg* (D.C.Cir. 1971) 463 F.2d 788; *Peoples* v. *United States Department of Agriculture* (D.C.Cir. 1970) 427 F.2d 561, 567; *Bank of Dearborn* v. *Saxon* (E.D.Mich. 1965) 244 F.Supp. 394, affirmed (6 Cir. 1967) 377 F.2d 496.

[13]In *Dunlop* v. *Bachowski*, supra, 421 U.S. 560, the Court likewise recognized that, absent any showing of irregularity, a statement by the Secretary of Labor of his reasons for refusing to issue a complaint would be sufficient for judicial review, but that the unusual case involving evidence that the Secretary's "decision would be 'plainly beyond the bounds of the Act [or] clearly defiant of the Act'" would be "a matter of grave public concern" justifying further judicial inquiry (421 U.S. 574). This is such a case.

3. Socal Has No Avenue Of Judicial Review Except Its Suit In District Court.

The Commission's contention that its order (Pet., Appx. E) refusing Socal any discovery or hearing on the reason to believe issue is not "final agency action" subject to judicial review (Pet., p. 17) disregards this Court's repeated admonition that the "generous" review provisions of the APA must be given a "hospitable interpretation," and that "the cases dealing with judicial review of administrative action have interpreted the 'finality' element in a pragmatic way" (*Abbott Laboratories* v. *Gardner* (1967) 387 U.S. 136, 149). "[T]he core principle [is] that statutorily created finality requirements should, if possible, be construed so as not to cause crucial collateral claims to be lost" (*Mathews* v. *Eldridge* (1976) 424 U.S. 319, 331, n. 11; cf. *Cohen* v *Beneficial Loan Corp.* (1949) 337 U.S. 541, 546).

The Administrative Procedure Act specifies that agency action "subject to judicial review" includes "final agency action for which there is no other adequate remedy in a court" (5 U.S.C. § 704). The legislative history of the Act makes clear that this language was to receive a practical construction, not a technical parsing such as that advanced in the present petition:

> "The Committee on the Judiciary of both the House and the Senate included in their reports a statement that " 'final action includes any effective agency action for which there is no other adequate remedy in any court' * * *. We thus construe 'final action' as used in § 10(c) of the Administrative Procedure Act [5 U.S.C. § 704] * * * to mean what the Committee

said it meant" (*Deering Milliken, Inc.* v. *Johnston* (4 Cir. 1961) 295 F.2d 856, 865-866).[14]

In the instant case, Socal has no avenue to obtain judicial review of the Commission's unlawful conduct other than its suit in the district court. The Commission's argument that Socal may obtain review of its contention that the complaint was unlawfully issued upon final review of any cease and desist order that may ultimately be entered in Docket No. 8934 a decade or more in the future is incorrect both as a practical matter and as a legal matter.

As a practical matter, it is preposterous to suggest that a court of appeals, a decade or more hence, after entry of a cease and desist order in a massive Commission proceeding, would vacate the order even though it was supported by substantial evidence and remand the case for further proceedings to determine whether the Commission had adhered to a statutory requirement when it issued the complaint back in 1973.

As a legal matter, the courts of appeals have held that on review of a Commission cease and desist order, the only question before them is whether the order is supported by substantial evidence, not whether there was lawful basis for issuance of the complaint in the first instance

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[14]In the leading *Deering Milliken* case, Chief Judge Haynsworth affirmed an injunction against an interlocutory remand order by the National Labor Relations Board that had been challenged as violative of section 6(a) of the Administrative Procedure Act, which requires the Board to "proceed with reasonable dispatch to conclude any matter presented to it." The court realized that plaintiff's legal contention could not be remedied on review of any final Board order in the proceedings. In the same fashion, respondent in the instant case has no other adequate remedy to vindicate its claim.

(*Jewel Companies, Inc.* v. *F.T.C.* (7 Cir. 1970) 432 F.2d 1155; *Elmo Division of Drive-X Company* v. *Dixon* (D.C. Cir. 1965) 348 F.2d 342, 344 ("[t]he prospect of ultimate appellate review of any final order issuing out of the new complaint proceeding is not adequate. The type of procedural error appellant asserts is not of a kind which affects the Commission's substantive findings")). In *Jewel Companies, Inc.* v. *FTC,* supra, the court held that appellate review of a Commission cease and desist order was not an adequate remedy for a claim that a Commission complaint had been invalidly issued upon the irregular vote of one Commissioner:

> "If the question of the Commissioner's obligation is postponed until final appeal of a Commission order, *the standard of review will be different. At that point the court of appeals would only decide whether the final order is supported by the evidence and would not question the authority of the Commission in issuing the complaint.* As in *Skinner & Eddy* [*Skinner & Eddy Corp.* v. *United States* (1919) 249 U.S. 557], 'the so-called administrative remedy was without relevance to the plaintiff's claim'" (432 F.2d 1159, emphasis supplied).

The Commission's argument (Pet., pp. 20-21) that heavy expenses of exhausting an administrative remedy will not justify *pre-exhaustion* judicial review and that "irreparable injury" and "clear violation" of law must be shown to justify pre-exhaustion judicial review have no bearing on the issue at hand. Heavy expenses may be required *to exhaust an available remedy, but Socal has no other remedy to exhaust* on issuance of the complaint in Docket No. 8934. Similarly, the requirements of "irrepar-

able injury" and "clear violation" of law are imposed where there is a remedy that could be exhausted. The point here is that Socal does not have any remedy for the Commission's unlawful action except the suit it filed in district court.

The Commission admitted in the court below that Socal has no other avenue of judicial relief and that ultimate appellate review of a cease and desist order would not extend to the unlawful complaint issuance in this case because of the applicable standard of review and the doctrine of harmless error (Brief for the Appellees, pp. 42-45). But the Commission nevertheless argues in this Court that its unlawful action is not subject to review in district court either. The Commission's erroneous argument would rewrite the review provisions of the APA and open the door to the most obvious abuses of administrative power free from judicial correction at any time.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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